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No. 89-337

In The

Supreme Court of the United States

October Term, 1989

NATIONAL MINES CORPORATION,

Petitioner,

v.

MICHAEL E. CARYL, as Tax Commissioner of the State of West Virginia,

Respondent.

BRIEF IN OPPOSITION TO THE PETITION

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QUESTIONS PRESENTED

Shall this Court compel retroactive application of its holding in *Armco, Inc. v. Hardesty*, 467 U.S. 638 (1984)?

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On Writ Of Certiorari To The Supreme Court Of Appeals Of West Virginia

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JURISDICTIONAL STATEMENT

National Mines Corporation seeks a writ of certiorari to the Supreme Court of Appeals of West Virginia as the result of an order entered May 31, 1989, by the Supreme Court of Appeals of West Virginia denying National Mines Corporation's petition for appeal from an order entered by the Circuit Court of Kanawha County, West Virginia, on May 2, 1988. Petitioner invokes the jurisdiction of this Court under 28 U.S.C. § 1257, stating that

petitioner "asserts the right to be free of impermissible burdens on interstate commerce, which right is conferred by the Commerce Clause, and its right to be free from enforcement of a tax sought to be collected under an admittedly unconstitutional statute, which right is conferred by the Supremacy Clause." Petitioner's Jurisdictional Statement, page 1. However, here there is no constitutional challenge.

The circuit court below agreed with the petitioner that the taxing scheme at issue was unconstitutional as a violation of the Commerce Clause and that it was invalidated by *Armco, Inc. v. Hardesty*, 467 U.S. 638 (1984), *rehearing denied*, 469 U.S. 912 (1984). The circuit court declined to grant the petitioner the relief sought because it was bound to apply *Ashland Oil, Inc. v. Rose*, 350 S.E.2d 531 (W. Va. 1986), *appeal dismissed*, 481 U.S. 1025 (1987) (dismissed for want of a final decision), which applied *Armco* prospectively only. The only issue presented to this Court is whether prospective application of *Armco* is proper. As such, petitioner's assertion of jurisdiction is invalid.

This Court has repeatedly recognized that questions of retroactivity are not constitutional in nature. *Great Northern R. Co. v. Sunburst Oil and Refining Co.*, 287 U.S. 358 (1932); *United States v. Johnson*, 457 U.S. 537 (1982). For purposes of this petition, no issue remains where a state statute has been "drawn in question." The lower court did not uphold a state statute in the face of a constitutional challenge, and, accordingly, this petition should be denied because the petition is not within the jurisdiction of 28 U.S.C. § 1257.

STATEMENT OF THE CASE

Petitioner is a corporation principally engaged in the production and sale of coal. Its corporate headquarters are located in Lexington, Kentucky. Petitioner operates mines located in Pennsylvania, Kentucky and West Virginia.

During the audit period, petitioner engaged in substantial mining in West Virginia and paid a total of $3,337,522.00 in business and occupation tax with respect to its mining operation in West Virginia.

Petitioner operated one deep mine in West Virginia which employed approximately 350 to 400 persons. Additionally, petitioner had 12 to 18 contract miners working on approximately eighteen to nineteen thousand acres in West Virginia.

Petitioner also sells a substantial amount of coal which it mines at out-of-state locations to West Virginia customers. The vast majority of its sales into West Virginia were sold under contract to Weirton Steel Company.

The audit findings included unreported income attributable to (1) engineering fees, (2) federal reclamation fees, (3) production of coal from contract miners and (4) wholesale sales of coal produced in Pennsylvania and Kentucky and sold to West Virginia customers.

Petitioner has conceded the taxability of gross income of all the above items except West Virginia's wholesale sale of coal produced in Kentucky.

With respect to its mining operation in Kentucky, petitioner pays the Commonwealth of Kentucky a corporate net income tax, a property tax, and a coal severance

tax. The coal severance tax is measured by the gross receipts from the sales of the coal less certain adjustments. KY. REV. STAT. § 143.020 (1978). The adjustments are for (1) coal processing costs, (2) transportation costs, and (3) brokered coal. During the audit period, the coal severance tax rate was four percent prior to July 1, 1976, and four and one-half percent thereafter.

For each year of the audit period, January 1, 1975 through December 31, 1979, petitioner has paid the Kentucky coal severance tax on coal which petitioner ultimately sold to West Virginia customers.

REASONS FOR DENYING THE WRIT

I.

THE SUPREMACY CLAUSE IS NOT A TOOL TO AVOID THE PROPER DECISION OF A STATE COURT ON THE QUESTION OF THE PROSPECTIVITY OR RETROACTIVITY OF RELIEF TO BE GRANTED TO AGGRIEVED TAXPAYERS AFTER A STATE TAX STATUTE HAS BEEN FOUND TO BE UNCONSTITUTIONAL.

The petitioner attempts to use the Supremacy Clause of the United States Constitution, Article VI, Clause 2, to do what it could not do in the courts below: avoid the decision of the Supreme Court of Appeals of West Virginia in the case of *Ashland Oil, Inc. v. Rose*, 350 S.E.2d 531 (W. Va. 1986), *appeal dismissed*, 481 U.S. 1025 (1987) (dismissed for want of a final decision). *Ashland* denied retroactive application of this Court's decision in *Armco, Inc. v. Hardesty*, 467 U.S. 638 (1984), *rehearing denied*, 469 U.S. 912

(1984), which invalidated the West Virginia business and occupation tax on wholesale sales by out-of-state manufacturers. The petitioner argues that the Supremacy Clause operated to provide a retroactive effect to the *Armco* decision because the Supremacy Clause invalidates state law that is contrary to federal law. This contention must be rejected for two reasons. First, the petitioner is simply wrong, for its argument ignores the substantial development of law by this Court on the question of the effect of its decisions which invalidate prior law on constitutional grounds. Second, if this Court accepts the argument of the petitioner which seeks to apply the Supremacy Clause to the case, it will open a path backwards to the past that has the potential to frustrate the ability of this Court, or any other court, to redress future constitutional infirmities.

There is but one question presented to this Court by the instant petition. That question is, "Shall this Court compel retroactive application of its holding in *Armco*?" All of the petitioner's arguments, both on Supremacy Clause and Commerce Clause grounds, are but shadows cast by this central question.

The respondent acknowledges that this Court's ruling in *Armco* applies to the petitioner in this case. As noted by the circuit court below, although the petitioner does not fall precisely within the holding of *Armco*, the statute, as applied to the petitioner, violates the Commerce Clause of the United States Constitution, Article I, § 8, Clause 3, in the same manner. This point being conceded by respondents, it must follow what relief that petitioner may be afforded. The respondent asserts that the circuit court properly applied *Ashland Oil, Inc. v. Rose*,

350 S.E.2d 531 (W. Va. 1986), *appeal dismissed* 481 U.S. 1025 (1987), and that *Ashland Oil* is controlling upon the petitioner.

In *Ashland Oil* the Supreme Court of Appeals of West Virginia was directly confronted with the question of the retroactive or prospective application of *Armco*. The court applied its criteria for prospective application of judicial decisions in civil cases which is found in Syllabus Point 5 of *Bradley v. Appalachian Power Co.*, 163 W. Va. 332, 256 S.E.2d 879 (1979). The syllabus point states:

> "In determining whether to extend full retroactivity, the following factors are to be considered: First, the nature of the substantive issue overruled must be determined. If the issue involves a traditionally settled area of law, such as contracts or property as distinguished from torts, and the new rule was not clearly foreshadowed, then retroactivity is less justified. Second, where the overruled decision deals with procedural law rather than substantive, retroactivity ordinarily will be more readily accorded. Third, common law decisions, when overruled, may result in the overruling decision being given retroactive effect, since the substantive issue usually has a narrower impact and is likely to involve fewer parties. Fourth, where, on the other hand, substantial public issues are involved, arising from statutory or constitutional interpretations that represent a clear departure from prior precedent, prospective application will ordinarily be favored. Fifth, the more radically the new decision departs from previous substantive law, the greater the need for limiting retroactivity. Finally, this Court will also look to the precedent of other courts which have determined the retroactive/prospective question in the same area of the law in their overruling decisions."

The West Virginia Supreme Court applied the *Bradley* factors, finding that the substantive issue of *Armco* was a traditionally settled area of law, state taxation; that it involved an unexpected departure from prior law without foreshadowing of the change; that the *Armco* decision overruled a statute that had been in existence since 1935, and not a common-law decision, thus, producing a wider impact with more severe hardships resulting; that the *Armco* case was a constitutional interpretation departing from prior precedent; and that previous law required payment of the wholesale tax. The court concluded that, based on these factors, it would apply the principles enunciated in *Armco* prospectively from the date of this Court's decision in that case.

As the Supreme Court of Appeals of West Virginia noted in *Ashland*, 350 S.E.2d at 534, note 6, the *Bradley* "criteria follow closely the analysis employed by the United States Supreme Court in *Chevron Oil Co. v. Huson*, 404 U.S. 97, 106-107 (1971), and later cases." In *Chevron*, this Court set forth its standards governing prospective application of judicial decisions in civil cases as follows:

> "First, the decision to be applied nonretroactively must establish a new principle of law, either by overruling clear past precedent on which the litigants may have relied * * * or by deciding an issue of first impression whose resolution was not clearly foreshadowed * * *. Second, * * * 'we must * * * weigh the merits and demerits in each case by looking to the prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or retard this operation.' * * * Finally, we have weighed the inequity imposed by retroactive application, for '[w]here a decision of this

> Court would produce substantial inequitable results if applied retroactively, there is ample basis in our cases for avoiding the 'injustice or hardship' by a holding of nonretroactivity." [citations omitted.] *Chevron*, 404 U.S. at 106-107.

Thus, the test employed by the West Virginia Supreme Court of Appeals varied little from the test this Court itself would apply.

This Court has previously noted that tax refund issues, or issues involving the appropriate remedy for the imposition of an unconstitutional tax, are "frequently intertwined with, or their consideration obviated by, issues of state law" and may be better resolved at the state level. *Baccus Imports, Ltd. v. Dias*, 468 U.S. 263, 277 (1984). *Accord, Tyler Pipe Industries v. Dept. of Revenue*, 483 U.S. 232 (1987); *Davis v. Michigan Dept. of Treasury*, 489 U.S. ___, 109 S. Ct. 1500 (1989). Therefore, we should look first to the laws of the state whose statute has been invalidated.

West Virginia's law has acknowledged as a general rule the position that an unconstitutional law is inoperative as if it were never passed. *Comm. on Legal Ethics of the West Virginia State Bar v. Triplett*, 378 S.E.2d 82 (W. Va. 1988) citing *Ex parte Siebold*, 100 U.S. 371 (1879); *Norton v. Shelby County*, 118 U.S. 425 (1886). However, both this Court and the West Virginia Supreme Court have also long recognized that the absolute rule of *Ex parte Siebold* and *Norton* may be modified. In *Chicot Co. Drainage Dist. v. Baxter State Bank*, 308 U.S. 371 (1940), Chief Justice Hughes addressed the *Norton* position when he wrote

that "such broad statements as to the effect of a determination of unconstitutionality must be taken with qualifications." 308 U.S. at 374. "The actual existence of a statute," he noted, "is an operative fact and may have consequences which cannot justly be ignored." *Id.* at 374. *See, Cipriano v. Houma*, 395 U.S. 701 (1969) (prospective application of ruling that a state statute concerning municipal bond issues was unconstitutional so as to avoid significant hardships). The West Virginia courts have adopted a similar analysis, beginning with *Morton v. Cabot*, 134 W. Va. 55, 63 S.E.2d 861 (1949). *See, City of Fairmont v. Pitrolo Pontiac-Cadillac Co.*, 308 S.E.2d 527 (W. Va. 1983); *Williamson v. Gane*, 345 S.E.2d 318 (W. Va. 1986). Thus, under both federal and West Virginia law, the general rule of retroactivity is tempered by a pragmatic approach which allows exception to the rule where the tests of *Chevron* and *Bradley*, respectively, may be applied.

It was Justice Cardozo, in *Great Northern R. Co. v. Sunburst Oil and Refining Co.*, 287 U.S. 358 (1932), who cleared the way for state courts to make their own retroactivity decisions, either "forward operation" or "relation back." *Id.* at 364. In writing for the majority, he held that there was no protected federal constitutional right involved when a state, in that instance, Montana, applied its non-retroactive doctrine of *stare decisis* and left the question for the Montana courts to decide.

It is axiomatic that the United States Constitution is the "superior, paramount law" of the land, *Marbury v. Madison*, 5 U.S. (1 Cranch.) 137, 177 (1803), and that the Constitution binds all courts. *Cooper v. Aaron*, 358 U.S. 1 (1958). The *Ashland* decision, as well as that of the circuit

court herein which followed *Ashland*, obeys these fundamental tenets. The *Ashland* decision obeys the *Armco* holding – it simply applies West Virginia law to determine whether to retroactively invalidate the offending statute or to apply the *Armco* rule prospectively only.

The Supremacy Clause of the United States Constitution, Article VI, Clause 2, will not, thus, serve as a tool on behalf of the petitioner to compel a retroactive invalidation of the offending statute. The United States Constitution has no voice on the subject of prospective or retroactive application. *United States v. Johnson*, 457 U.S. 537, 542 (1982). *See also*, *Great Northern R. Co. v. Sunburst Oil and Refining Co.*, 287 U.S. 358 (1932) (denying a United States Constitutional due process attack on the prospective application of the Montana Supreme Court); *Linkletter v. Walker*, 381 U.S. 618 (1965) (refusal to apply *Mapp v. Ohio*, 367 U.S. 643 (1961) retroactively). As respondent has previously shown, the *Ashland* decision upon which the circuit rested the order in petitioner's case is well within the scope of this Court's *Chevron* test and should be respected.

The final failing in the petitioner's Supremacy Clause argument is that the argument ignores the draconian impact of the logical extension of its stance. Thus, petitioner's position, the respondent believes, may be summarized as: if a statute is unconstitutional, then by operation of the Supremacy Clause, it must be considered to have never existed; if a statute is considered to have never existed, it may not be enforced. It is an absolutist view with its feet soundly in the language of *Norton v. Shelby County*, 118 U.S. 425 (1886). As has been previously

noted, Chief Justice Hughes spoke to this view of the law in *Chicot Co.*, when, referring directly to *Norton*, he said:

> "It is quite clear, however, that such broad statements as to the effect of a determination of unconstitutionality must be taken with qualifications. The actual existence of a statute, prior to such a determination, is an operative fact and may have consequences which cannot justly be ignored. The past cannot always be erased by a new judicial declaration. The effect of the subsequent ruling as to invalidity may have to be considered in various aspects, – with respect to particular relations, individual and corporate, and particular conduct, private and official. Questions of rights claimed to have become vested, of status, of prior determinations deemed to have finality and acted upon accordingly, of public policy in the light of the nature both of the statute and of its previous application, demand examination. These questions are among the most difficult of those which have engaged the attention of courts, state and federal, *and it is manifest from numerous decisions that an all-inclusive statement of a principle of absolute retroactive invalidity cannot be justified.*" (Emphasis added.) *Chicot Co.*, 308 U.S. at 374.

In *Linkletter v. Walker*, 381 U.S. 618 (1965), this Court freed itself from the Blackstonian view that a court was not to "pronounce new law, but to maintain and expound the old one." *Linkletter v. Walker*, 381 U.S. at 622-623 [quoting 1 Blackstone, Commentaries 69 (15th ed 1809)]. In an extensive analysis authored by Justice Clark, this Court made an exhaustive review of the development of the theories of the retroactivity of judicial decisions. This Court concluded its opinion saying:

> "All that we decide today is that though the error complained of might be fundamental it is not of the nature requiring us to overturn all final convictions based upon it. After full consideration of all the factors we are not able to say that the Mapp rule requires retrospective application." *Linkletter v. Walker*, 381 U.S. 639-640.

Thus, this Court was set free to rule on the present and future without apprehension about the past. Beytagh, *Ten Years of Non-Retroactivity; A Critique and A Proposal*, 61 Va. L. Rev. 1557, 1562-1563 (1975). To use the Supremacy Clause as petitioner would have this Court apply it, would sweep this Court back to Blackstone, where every decision of this Court adopting a new constitutional interpretation would set off a chain reaction into the past.

II.

WEST VIRGINIA'S ASSESSMENT IMPOSES NO MULTIPLE BURDEN OF TAXATION ON THE PETITIONER.

The Commerce Clause of the United States Constitution, Article I, § 8, Clause 3, provides, in pertinent part, that Congress shall have the power "[t]o regulate commerce with foreign nations, and among the several states." This power is limited by the requirements announced in *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (1977), wherein this Court held that interstate commerce may be required to pay its fair share of state taxes.

State taxation will be upheld when the tax is applied to an activity with a substantial nexus to the tax state, is fairly apportioned, is fairly related to services provided

by the state and does not discriminate against interstate commerce. *Complete Auto Transit, Inc. v. Brady, id.*

The petitioner herein claims that the West Virginia business and occupation tax on wholesale sales, when added to Kentucky's severance tax, constitutes a violation of the Commerce Clause in that it would impermissibly subject the petitioner to multiple tax burdens. Petitioner argues that since West Virginia and Kentucky tax the same gross receipts, a legitimate multiple-burdens claim results. This would, at first glance, be persuasive if the petitioner's argument were not fundamentally and fatally flawed. Neither West Virginia's nor Kentucky's taxes which are challenged herein are taxes on gross receipts. In both statutes, W. Va. Code 11-13-2c (1983) and KY. REV. STAT. § 143.020 (1978), it is an *activity* that is being taxed and not gross receipts. Indeed, Kentucky's severance tax provides for a minimum tax calculated not on the gross value of the coal severed, but on a fixed rate per ton severed. Should the price of Kentucky's coal fall sufficiently low, the measure of the Kentucky severance tax would cease to be gross value. What then happens to petitioner's argument that West Virginia's tax constitutes an unconstitutional multiple burden of taxation on petitioner because petitioner must pay taxes on the same gross receipts by two or more states? It collapses. The taxes involved here are taxes on activities, not on gross receipts. Gross receipts are simply the mechanism by which each tax may be calculated.

There is no question of improper apportionment here. A tax is presumed to be self-apportioning when the activity taxed occurs wholly within the state where the tax is imposed. *Standard Pressed Steel Co. v. Washington*,

419 U.S. 560 (1975); *Tyler Pipe Industries v. Dept. of Revenue*, 483 U.S. 232 (1987). There is utterly no evidence that the activity taxed by West Virginia, wholesale sales, did not occur wholly within the State of West Virginia. The tax on the wholesaling activities of petitioner is, therefore, properly apportioned.

The petitioner complains that the lower court misinterpreted this Court's opinion in *Tyler Pipe*, with respect to the issue of apportionment. Respondent submits that this court spoke directly to this issue when it said:

> "Tyler also asserts that the B & O tax does not fairly apportion the tax burden between its activities in Washington and its activities in other States. See Complete Auto Transit, Inc. v. Brady, 430 US 274, 285, 51 L Ed 2d 326, 97 S Ct 1076 (1977). Washington taxes the full value of receipts from in-state wholesaling or manufacturing; thus, an out-of-state manufacturer selling in Washington is subject to an unapportioned wholesale tax even though the value of the wholesale transaction is partly attributable to manufacturing activity carried on in another State that plainly has jurisdiction to tax that activity. This apportionment argument rests on the erroneous assumption that through the B & O tax, Washington is taxing the unitary activity of manufacturing and wholesaling. We have already determined, however, that the manufacturing tax and wholesaling tax are not compensating taxes for substantially equivalent events invalidating the multiple activities exemption. Thus, the activity of wholesaling – whether by an in-state or an out-of-state manufacturer – must be viewed as a separate activity conducted wholly within Washington that no other State has jurisdiction to tax. See Moorman Mfg. Co. v. Bair, 437 US, at 280-281, 57 L Ed 2d

> 197, 98 S Ct 2340 (gross receipts tax on sales to customers within state would be 'plainly valid'); Standard Pressed Steel Co. v. Washington Revenue Dept, 419 US, at 564, 42 L Ed 2d 719, 95 S Ct 706 (selling tax measured by gross proceeds of sales is 'apportioned exactly to the activities taxed')." *Tyler Pipe*, 483 U.S. at 251.

Petitioner can point to no substantive difference between its position and the position of the out-of-state manufacturer described in the above-quoted language. Since, under both *Armco* and *Tyler Pipe*, the petitioner's severance activity and wholesaling activity could not be regarded as substantially equivalent events, it follows that the activity of wholesaling taxed here by West Virginia is a separate activity that no other state has jurisdiction to tax. Ironically, beyond the petitioner's erroneous reliance on the semantics of "gross receipts," it was petitioner's success at demonstrating an *Armco* Commerce Clause violation that seals the defeat of his multiple burdens claims. This ground is simply an attempt by petitioner to avoid the effect of *Ashland Oil* by striving to distinguish itself from the *Armco/Tyler Pipe/Ashland Oil* line of cases.

III.

WEST VIRGINIA'S ASSESSMENT IS REASONABLY RELATED TO THE BENEFITS CONFERRED BY THE STATE.

The circuit court correctly determined that the West Virginia business and occupation tax assessed was reasonably related to benefits conferred upon the petitioner. The tax assessed is directly related to the benefits

afforded the petitioner. The more a taxpayer affords itself of the opportunities available in West Virginia, the more tax it pays; *i.e.*, the more wholesale activities it conducts, the more its gross receipts will be and the more tax it will pay.

This Court has recently restated that "a taxpayer's receipt of police and fire protection, the use of public roads and mass transit, and the other advantages of civilized society satisfies the requirement that the tax be fairly related to benefits provided by the state to the taxpayer." *D. H. Holmes Co. Ltd. v. McNamara*, 468 U.S. 24, ___, 108 S. Ct. 1619, 1624 (1988). West Virginia has given the petitioner something for which it may ask a return. The tax assessed meets the fourth prong of the *Complete Auto* test, and does not violate the Commerce Clause.

CONCLUSION

The respondent respectfully submits that, for the foregoing reasons, jurisdiction does not lie here under 28 U.S.C. § 1257 and that the orders of the West Virginia courts are, in all respects, manifestly correct, and the relief to which the respondent is entitled is that the

Petition for a Writ of Certiorari to the Supreme Court of Appeals of West Virginia be denied.

Respectfully submitted,

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